APPENDIX "A"

Statutes Involved

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * * * * * *

(b) *Collection of Deficiency Found by Board.*—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * * * * * *

(h) *Final Decisions of Board.*—For the purposes of this chapter the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1140.

SEC. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Board and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion, the Board shall report in writing all of its findings of fact, opinions and memorandum opinions.

Appendix "A"

(c) *Date of Decision.*—A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

* * * * * * * * *

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed On Time.* Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or a taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

Appendix "A"

SEC. 1145. BOND TO STAY ASSESSMENT AND COLLECTION.

Notwithstanding any provisions of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect to such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Tax Court is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced."

SEC. 1146. REFUND, CREDIT, OR ABATEMENT OF AMOUNTS DISALLOWED.

In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Tax Court is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer without the making of claim therefor, or, if *collection has not been made*, shall be abated.

Internal Revenue Code of 1954:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. • • •

APPENDIX "B"

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,868

June 13, 1956

BESSIE LASKY AND JESSE L. LASKY, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petitions for Review of the Decisions of the Tax Court of the United States

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Before: DENMAN, Chief Judge, LEMMON, Circuit Judge, and SOLOMON, District Judge.

DENMAN, Chief Judge:

Lasky and his wife seek to petition this court for review of decisions of the Tax Court, "an independent agency in the Executive Branch of the Government".[1] That agency

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[1] 26 U.S.C. § 1100 [now 26 U.S.C. § 7441], reading:

§ 7441. Status.

The Board of Tax Appeals shall be continued as an independent agency in the executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court. Aug. 16, 1954, 9:45 E.D.T. c. 736, 68A Stat. 879.

held that over $800,000.00 received by Lasky in connection with the motion picture "Sergeant York" was ordinary income rather than capital gain, and consequently that Lasky and his wife each owe tax deficiencies of over $224,500.00.

The Commissioner challenges the jurisdiction of this Court of Appeals to consider the merits of the claimed right of review and moved to dismiss the petitions, contending that they were not filed within three months after the decision of the Tax Court as was required by 26 U.S.C. § 1142 which provided:[2]

> "The decisions of the Tax Court . . . may be reviewed by a court of appeals . . . if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision was rendered . . ."

and by 26 U.S.C. § 1140 making the agency's decision final, reading:

> "§ 1140. Date when Tax Court decision becomes final
>
> The Decision of the Tax Court shall become final—
> (a) Petition for review not filed on time. Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time;"

Clearly here the conditions precedent to the Court of Appeals' jurisdiction to review Tax Court action is the filing of the petition within three months of the Tax Court's first decision which was entered on April 8, 1954. No such petition was filed. Some four months after the decision, on August 23, 1954, the petitioners moved the Tax Court to vacate the decision of April 8, 1954, on the ground

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[2] Now 26 U.S.C. § 7482.

of excusable neglect,[3] a power formerly in the federal courts' equity jurisdiction, Cf, Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937), and now contained in Rule 60(b) F.R.C.P. which by Rule 1 is confined to the United States District Courts and not applicable to executive agencies.[4]

Though not a court at all but merely an administrative agency it assumed the power of a district court and in December, 1954, it granted petitioners' motions to vacate its decision of April 8, 1954, and for the taking of additional evidence. After additional evidence was taken, the Tax Court rendered a second decision reaching the same result as in the first. The petition for review of the second decision was filed well within three months of the date is was entered.

In Swall v. Commissioner of Internal Revenue, 122 F. 2d 324 (Cir. 9), cert. denied, 314 U.S. 697 (1941), this Court held that a decision of this administrative agency [then called the Board of Tax Appeals] becomes final three months after it was entered and that thereafter the Tax Court has no power to modify it or reconsider it. The decision was based on the precedent statutes applicable to the agency when it was called the Board of Tax Appeals identical with those cited supra by the Commissioner as the basis of his motion to dismiss.

Our decision in the Swall case was preceded by similar decisions of the First Circuit, Sweet v. Commissioner, 120 F. 2d 77, succeeded by a second decision, Denholm & McKay v. Commissioner, 132 F. 2d 243; the Second Circuit in Monjar v. Commissioner, 140 F. 2d 263; and the Third Circuit in White's Will v. Commissioner, 142 F. 2d 746.

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[3] The failure to act in the statutory period was caused by the misfiling of the Tax Court's decisions in the office of petitioners' former attorney by a member of his staff.

[4] Katz v. Commissioner of Int. Rev., 188 F. 2d 957 (Cir. 2, 1951).

Appendix "B"

Our Swall case and these cases are based on our construction of the word "final" in the § 1140 cited supra as the Supreme Court in Helvering v. Northern Coal Co., 293 U.S. 191 (1934) construed the word "final" as used with reference to that court's decisions in the Revenue Act of 1926. There the Supreme Court had rendered its judgment affirming several judgments of the Board of Tax Appeals and issued its mandates. During the term of the court motions for petitions for rehearing were filed which in ordinary cases the court had the jurisdiction to entertain. It held that:

> "Section 1005(a)(4) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, 111, U.S.C., Tit. 26, § 640, with respect to decisions of the Board of Tax Appeals, provides:
>
> Sec. 1005(a). The decision of the Board shall become final— . . .
>
> (4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.
>
> In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied."

Some nine years later the Supreme Court again held that the finality provided in the legislation gave it no jurisdiction to afford relief thereafter. R. Simpson & Co. v. Commisisoner, 321 U.S. 225, 228 et seq.

Obviously if the Supreme Court lacks the power to reconsider because the decision of the Board has become "final", a fortiori such an agency as the Tax Court likewise lacks the power by the words of Section 1140 that "The decision of the Tax Court shall become final . . . upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within that time."

Appendix "B"

Counsel for the Laskys, ignoring the Congressional definition of it as an executive agency, contend that the Tax Court is "like other *courts*" and hence as a *court* has the "*inherent* power to control, amend, open and vacate its decisions."

Extraordinary as it is that counsel, without mention of the statutory definition, seeks to have us act as if it did not exist, we find that the Sixth Circuit, in Reo Motors v. Commissioner, 219 F. 2d 610, similarly ignores the statute and, without mentioning it, treats the Tax Court not as a mere executive agency but as having the inherent power of a United States Court.

In that case the Tax Court, more than three months after its final decision, ordered it set aside on the ground of mutual mistake of fact of both the parties in presenting the case to the agency. The Sixth Circuit holds of this executive agency that it has the jurisdiction so to act since "as a practical matter, it is a court exercising *inherently* judicial functions and having the necessary judicial powers to carry out such functions." It treats the agency as having the powers of a court to grant a writ of error coram nobis.

That court relies on the case of Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1925). There the sole question was whether the Board of Tax Appeals had the power to make rules governing the right to practice before it. The Supreme Court held the agency had this power because of its "quasi judicial" character, quoting the words of the statute that "The Board shall be an independent agency in the executive branch of the government." Nothing in that opinion remotely suggests that the agency is a court having the inherent power to issue writs coram nobis. Its quasi judicial powers of making rules, summoning witnesses, etc., are no more than are given other executive agencies such as the National Labor Relations Board.

Further, the Sixth Circuit opinion fails to mention the Supreme Court decision in Helvering v. Northern Coal Co.,

supra, nine years after the Goldsmith decision was rendered. Nor does it consider our decision in the Swall case or the four other Circuit Court decisions cited above. That is to say, it ignores both the governing statute and the precedent opinions on it.

Both the Sixth Circuit and counsel here cite the case of La Floridienne J. Buttgenbach & Co. v. Commissioner, 63 F. 2d 630 (Cir. 5, 1933), where the court held *solely* that *on the stipulation of the parties* the Board of Tax Appeals could set aside its final order more than three months after its rendition. Here there is no such stipulation. More important still, the La Floridienne case was decided in 1933, the year before the Supreme Court rendered its Northern Coal Co. decision in 1934, determining that where the statutes make final the action of the taxing agency, no jurisdiction exists after such finality to set the decision aside. The *Buttgenbach* case was specifically criticized in our opinion in the *Swall* case, supra. Though parties may stipulate to the jurisdiction of the *person*, they may not do so as to the *subject matter*.

Finally the Laskys stress the decision of the Supreme Court in Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937). In effect, they claim this case overrules the Northern Coal decision of 1934, though it does not mention it. In that case the matter in question was the power not of a mere executive agency but of the bankruptcy court to vacate its own order dismissing a petition for reorganization under 77B of the bankruptcy act, after the time for appeal had expired and after the term of the court had ended. The district court held it had such power. The Court of Appeals held it had not and reversed. The Supreme Court reversed, holding the District Court sitting in bankruptcy, had no term and that it could exercise its equitable powers as a bankruptcy *court* to set aside its decision after the time for appeal had expired.

Here was no overruling of the Northern Coal case for the bankruptcy laws made no such provision for finality

of the court's decisions considered in that case, nor is there any such Congressional intent regarding the bankruptcy court as was expressed concerning the Tax Court agency by the Senate Committee Report on the identical predecessor section 1005 of the Revenue Act of 1926 now section 1140, which report stated:

> "Date on which decision becomes final.—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate."

And as a final answer to the contention that the Wayne Gas Co. case overruled the Northern Coal case, is the decision affirming the Northern Coal case in Simpson Co. case, decided seven years after the Wayne Gas case.

We hold the Tax Court was without jurisdiction to set aside its first decision and that this court has no jurisdiction to consider a petition for review of its second decision. The petition for review is ordered dismissed.

(Endorsed:) Opinion. Filed June 13, 1956. Paul P. O'Brien, Clerk.

APPENDIX "C"

Conflicting Opinions

REO MOTORS, INC. v. COMM.

(U. S. Court of Appeals, Sixth Circuit, No. 11300, Feb. 23, 1955)

ARGUED BY: Lee I. Park, Wash., D.C., attorney for petitioner;

Melva Graney, Wash., D.C., attorney for respondent;

ON BRIEF: Lee I. Park, K. Martin Worthy, Arthur Peter, Hamel, Park & Saunders, Wash., D.C., attorneys for petitioner.

H. Brian Holland, Asst. Attorney General; Ellis N. Slack, Melva M. Graney, Spl. Assts., Wash., D.C., attorneys for respondent.

On Petition for Review of an Order of the Tax Court of the United States.

Before ALLEN, MILLER and STEWART, Circuit Judges.

STEWART, Circuit Judge:

In the Tax Court petitioner sought a redetermination of a claimed deficiency in its excess profits tax for 1942. The sole question in issue was whether a capital loss sustained in 1941 could be carried over to 1942 and deducted from gross income for that year as an ordinary operating loss. It was stipulated by the parties in the Tax Court that the Commissioner's computation of petitioner's excess profits net income and excess profits credit, based on invested capital, were correct when computed without the claimed net operating loss deduction or net operating loss deduction adjustment.

The Tax Court decided against the petitioner and entered its decision determining a deficiency in the petitioner's excess profits tax for 1942 in the amount originally determined by the Commissioner. The Tax Court's decision

was affirmed by this court (170 F.[2d] 1001) [37 AFTR 584] and by the Supreme Court (338 U.S. 442) [38 AFTR 981]. The mandate of the Supreme Court issued on February 14, 1950, and the Tax Court's decision accordingly became "final" thirty days thereafter. Section 1140(b)(3) Internal Revenue Code for 1939.

Thereafter, on May 12, 1950, petitioner filed in the Tax Court its "Motion for Leave to File Motion to Withdraw and Reform Stipulation, for Further Hearing and Reconsideration, and to Revise Decision" and an accompanying "Motion to Withdraw and Reform Stipulation, for Further Hearing and Reconsideration, and to Revise Decision." In the substantive motion the petitioner alleged that, because of a mutual mistake of fact, an error had been made in the stipulation of its excess profits credit resulting from the omission from its invested capital of more than two million dollars paid in for stock; that if the correct excess profits credit had been used there would have been no deficiency in petitioner's excess profits tax for 1942; that the Commissioner had admitted this error in connection with another proceeding involving petitioner's excess profits tax liability for 1943; that in 1949 the petitioner had sought relief from its excess profits tax for the year 1942 under § 722 of the Internal Revenue Code of 1939, in response to which the Commissioner had contended that no § 722 relief could be given because the allowance of the petitioner's proper credits would result in no excess profits tax liability for the year 1942, making inapplicable the relief provisions of § 722.[1]

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[1] The letter to the petitioner setting forth the Commissioner's position contained the following language: " . . . the claim for recovery of the excess profits tax for the year 1942 is rejected on the grounds that no excess profits tax was due for the year without regard to the benefits of Section 722. Section 722 grants relief only if the tax computed according to the tax law without benefit of the section results in an excessive and discriminatory tax. The allowance of the taxpayer's property credits under Section 714 was sufficient to result in no tax liability for the year 1942."

In view of the circumstances, the motion stated, "The revision of the decision of this Court in this cause appears to be the only way to correct an obvious mutual mistake and to avoid a gross injustice to petitioner. For these reasons the petitioner urgently prays this Court to permit petitioner to withdraw and reform its stipulation to withdraw its agreement to, and file a substitute recomputation of, excess profits tax liability under Rule 50 and further prays the Court to reconsider the case, to grant further hearing if necessary and to revise its decision to the end that the tax may be correctly determined and a gross injustice avoided."

The motion for leave to file was summarily denied by the Tax Court, and the petitioner has sought review here of the order of denial. The Tax Court gave no reason for its denial, but it is assumed by both parties on this review that the ground for the denial of leave to file was the supposed lack of jurisdiction of the Tax Court to entertain the substantive motion, and we make the same assumption. The petitioner contends that, although the Tax Court's decision had become final before leave to file the motion for reconsideration was sought, the Tax Court should have granted leave to file the motion as one in the nature of a writ of error coram nobis. The petitioner points out that because of a lack of continuity of its officers and accounting personnel through receivership and reorganization, the management was not aware that its books did not reflect its true historical invested capital, and that the use of the correct excess profits credits would have entirely eliminated petitioner's excess profits tax liability for 1942. The petitioner points out that the Commissioner not only concedes this factual error, but is seeking to take advantage of it to the detriment of the petitioner in resisting petitioner's claim under § 722.

The petitioner argues that the mistake of fact here involved is of a kind traditionally within the reach of a writ of error coram nobis, because it is not only material

to the regularity of the decision of the Tax Court, but constitutes a clear and undeniable error, resulting in the incorrect computation of an excess profits tax liability for 1942 in the amount of more than a quarter of a million dollars, instead of no excess profits tax liability at all for such year.

We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e.g. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926) [5 AFTR 5842]; Stern v. Commissioner, 215 F.(2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error coram nobis. Cf. United States v. Morgan, 346 U.S. 502 (1954); United States v. Mayer, 235 U.S. 55 (1914); Rule 60(b), Federal Rules of Civil Procedure.

This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in La Floridienne J. Buttgenbach & Co. v. Commissioner of Internal Revenue, 63 F.(2d) 630 (1933) [12 AFTR 257]; and, very recently, by the Tax Court itself in Bessie Lasky, Jesse L. Lasky v. Commissioner, Tax Court Dockets Nos. 26396 and 26397 (1954).

In concluding that the Tax Court has power in its discretion, in extraordinary circumstances, to correct a decision after it has become final, we express no view as to whether the circumstances in this case were so extraordinary as to invite the exercise of that discretion. We hold only that the petitioner should have been granted leave to file its motion, and that the substantive motion should have been entertained and considered on its merits. It may well be that by reason of the petitioner's delay

or for other reasons not appearing in the record the Tax Court will decide the matter against the petitioner on the merits.

For the reasons stated the Tax Court's order denying petitioner's motion for leave to file its substantive motion is reversed, with instructions to grant said motion for leave to file and to entertain and consider petitioner's substantive motion on its merits.

La Floridienne J. Buttgenbach & Co. v. *Commissioner of Internal Revenue*, No. 6496 Circuit Court of Appeals, Fifth Circuit. February 18, 1933

Board of Tax Appeals could, after four years, vacate redetermination of income tax deficiency based on stipulation at instance of parties to stipulation, for good cause shown and reinstate matter for hearing, and could consider question of laches, collusion, or other thing rendering it inadvisable to vacate order (Revenue Act 1926, § 1005 [26 USCA § 1228]).

Joint petition of La Floridienne J. Buttgenbach & Co., taxpayer, and the Commissioner of Internal Revenue to vacate and set aside an order redetermining a tax deficiency and to enter an order agreed on. The Board of Tax Appeals denied the petition, and the taxpayer petitions for review.

Petition for review granted, and further proceedings directed.

J. G. Korner, Jr., of Washington, D.C., for petitioner.

G. A. Youngquist, Asst. Atty. Gen., Sewall Key and Norman D. Keller, Sp. Assts. to the Atty. Gen., and C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, and Shelby S. Faulkner, Sp. Atty., Bureau of Internal Revenue, both of Washington, D.C., for respondent.

Appendix "C"

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges.

SIBLEY, Circuit Judge.

The Board of Tax Appeals denied the joint petition of the taxpayer and the Commissioner of Internal Revenue to vacate and set aside an order redetermining a tax deficiency entered January 19, 1927, and to enter instead an order agreed on. The denial was based on a supposed want of power to set aside the order, as we are assured by counsel and as is indicated by the dissent filed by four members of the Board. The circumstances are extraordinary. The taxpayer, an alien corporation, was assessed with taxes, and its representative, a layman inexperienced in tax matters, conferred with an agent of the Bureau of Internal Revenue in charge of the case, who, not knowing of the changes in the law touching decisions of the Board of Tax Appeals made by the Revenue Act of 1926, represented that the taxpayer's contention that it was not subject to taxation could best be asserted by agreeing on the amount of the tax in a stipulation before the Board, paying the resulting redetermination, and then applying for refund to the Commissioner, who would make the refund if the taxpayer was found not taxable. This was all done by the taxpayer, but the Commissioner after long delay decided on February 25, 1931, that, though the supposed taxpayer was not liable to any tax, and was entitled to have back what had been collected, under the Revenue Act of 1926, § 284 (d), 26 USCA § 1065 (d), he could not make a refund in the face of the redetermination by the Board, notwithstanding the Board had not in fact passed upon the question of nonliability; and that an amendment or correction of the Board's order was necessary. The Commissioner thereupon signed a stipulation with the taxpayer showing the overpayment and its amount, and agreeing that the Board enter an order accordingly. He also joined in the petition which sets up the above facts, agreeing and conceding that the first stipulation was made under a

mutual mistake and misunderstanding carried into the Board's order of January 19, 1927, and praying that it be corrected so that proper refund could be made.

Counsel for the Commissioner here stands to the petition if it can be lawfully granted but as in duty bound contends that the Board after four years cannot vacate its order, especially since Revenue Act of 1926, § 1005 (26 USCA § 1228), expressly declares: "The decision of the board shall become final—(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time. * * * " We appreciate the necessity of prompt decisions touching taxes, and that they shall stand firm. The reviews mentioned in section 1005 no doubt measure the taxpayer's right to litigate, and the Board's decision is final on exhaustion or neglect of them as against further appeals. But it does not follow that the decision may not be further dealt with by the Board itself in its discretion or that no extraordinary relief against it can ever be had. Decisions of the Secretary of the Interior in matters affecting the public lands were by statute declared to be final, but that meant only as to further appeals, and did not exclude the courts from inquiring in extraordinary cases whether the law had been violated thereby. Johnson v. Towsley, 13 Wall, 72, 83, 20 L. Ed. 485. The Secretary himself can sometimes revise his own decision, as when obtained by fraud, though the statute declare it final and conclusive. Lane, Secretary v. United States ex rel. Mickadiet, 241 U.S. 201, 36 S. Ct. 599, 60 L. Ed. 956. So the Secretary of Labor's decisions on deportation proceedings are by statute final, but on extraordinary occasions they are inquired into on habeas corpus. Lindsey, U.S. Immigration Inspector v. Dobra (C.C.A.) 62 F. (2d) 116.

We shall not attempt to formulate any rule as to the control the Board of Tax Appeals has over its own judgments. Analogies have been suggested, ranging from the bill of review in a court of equity to the helplessness of a

special tribunal whose powers perish with the publication of its award. We rest here upon two extraordinary circumstances. The first is that the order to be vacated is not really a judgment of the Board representing its ascertainment of facts and application of the law to them, but is the agreement of the parties put into the form of a judgment, the order so reciting. The Board itself has on the face of its record never ascertained what, if any, taxes the taxpayer owed. The second circumstance is that both parties to the agreement are saying that the stipulation behind the order rests on a false and mistaken basis, and, if the order stands, it operates as a fraud arising out of the confidence that the inexperience of one party put in the knowledge and experience of the other. However unintended the advantage taken of the taxpayer, the Commissioner does not wish to retain it. We think no principle of justice would require that the Board's sanction of the stipulation should bind it to perpetuate the injustice. "We see no reason, either in law or public policy, why any proceeding, however final or conclusive, where the rights of no third party have intervened, may not be opened by the court where all the parties so agreed and the court be thus reinvested with jurisdiction to take further proceedings." Said of a tax assessment in Hewetson v. Chicago, 172 Ill. 112, 49 N.E. 992, 993. The Land Office ordinarily exhausts its powers when a patent is issued, but where by a mistake the patent issued is issued to the wrong person, on its surrender a patent can be issued to the right one. Bell v. Hearne, 19 How. 252, 15 L. Ed. 614. Whether the Board be treated as a court or a departmental agency with quasi judicial functions, we are of opinion that it may in its discretion vacate such an order as this is, reinstating the matter for hearing before it on its merits or accepting a new stipulation touching the liability. In such cases it may, of course, consider whether there be laches, or collusion, or other thing that would render it inadvisable to vacate its order.

Appendix "C"

We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown. The petition for review is granted, and further proceedings directed not inconsistent with this opinion.

JULIUS LONG STERN AND ELLEN V. STERN v. COMMISSIONER

(U. S. Court of Appeals, Third Circuit, No. 11226, Sept. 17, 1954)

Petition for review of a decision of the Tax Court of the United States.

Before MARIS, KALODNER and HASTIE, Circuit Judges.

Opinion of the Court

By MARIS, Circuit Judge:

This petition to review a decision of the Tax Court presents the question whether the loss, if any, which the taxpayer sustained upon the sale of his former residence in 1948 was non-deductible for income tax purposes under section 24(b)(1)(A) of the Internal Revenue Code. The facts in the case as found by the Tax Court are these:

The taxpayer,[1] Julius Long Stern, built a residence for himself at 36 West River Street, Wilkes-Barre, Pennsylvania, in 1925, at an approximate cost of $110,000. It is one of the four or five outstanding residences of Wilkes-Barre and is located in the most desirable residential section of the city. The taxpayer occupied the West River Street property as his personal residence until May 1947 when he moved to his new home in West Dallas, Pennsylvania. Construction on the taxpayer's new house had started in March 1946. At that time he decided to sell the West River Street property and discussed the

[1] Taxpayer and his wife, who is not involved in this matter, filed a joint return and hence are joined as petitioners.

matter first in the summer of 1946 with John Howell, and then in September 1946 with Harry Goeringer, both of whom are qualified real estate experts in Wilkes-Barre and who were intimately acquainted with the house at that time. The house was listed for sale first with the office of John Howell and later with Harry Goeringer at a price of $75,000. Later in January 1947, the house was also listed with other real estate offices in Wilkes-Barre. In September 1946 Harry Goeringer appraised the property at a fair market value of $60,000. Intensive efforts to sell the house were carried on by the real estate offices referred to above and the house was advertised for sale and other steps taken to interest prospective purchasers. Several prospects had been shown through the property and in March 1947 Charles S. Popky, through his attorney, submitted an offer to buy the house, including most of the furnishings, for a price of $40,000. The offer was accompanied by a check for $1,000. The furnishings of the West River Street property had been independently appraised by a qualified expert at a fair market value of $10,000. The Popky offer, which was based solely on Popky's ability to pay, was immediately rejected by the taxpayer as being far too low.

The taxpayer had been on the board of directors of the Miners National Bank of Wilkes-Barre for 25 years. In April 1947 he applied to the Miners National Bank for a loan on the West River Street property. As a result of the application Guy W. Moore and Harry Goeringer, both of whom were directors of, and appraisers for, the Miners National Bank, appraised the house for mortgage loan purposes at $50,000 and recommended a loan of 50% thereof to the taxpayer. The loan was granted in the amount of $25,000 and a mortgage for that amount was taken by the Miners National Bank on the property.

On June 5, 1947, Harry Goeringer made a third appraisal of the West River Street property for fair market value sales purposes and fixed the value at $60,000. The

years 1946 and 1947 were years of a very active real estate market in Wilkes-Barre, during which years materials for building purposes were scarce.

In the spring of 1947, the taxpayer's son-in-law, Dr. Samuel Guttman, informed the taxpayer that he had decided to move to Wilkes-Barre and open an office for the practice of psychiatry. This decision of Dr. Guttman was based upon his own judgment, after consultation with his wife but without the advice or suggestion of the taxpayer. Dr. Guttman was motivated by his desire to practice in a smaller community in which he could combine both his home and his office and in which living conditions would be less difficult than in Philadelphia, where he had been practicing. In addition, he was familiar with the area and knew that there was no other practicing psychiatrist in Wilkes-Barre or in Luzerne or Lackawanna counties.

Dr. Guttman inquired whether the taxpayer would rent the West River Street property. The house was expensive for the taxpayer to maintain and, after consultation with Harry Goeringer, the taxpayer decided to rent the house in order to cut down the cost of maintaining two houses. Upon the advice of Goeringer, a rental of $200 a month was set and the taxpayer leased the property at that rental for the period of one year beginning September 1, 1947. This rental was the highest rental for comparable property in Goeringer's experience and was paid from Dr. Guttman's professional earnings. The rental was paid by check and reported by the taxpayer on his income tax return.

Dr. Guttman, who anticipated a rental for longer than one year, made improvements in the West River Street property at a cost of approximately $3,000 in order to make it more readily usable as a combined home and office. The funds for these improvements were derived from Dr. Guttman's professional earnings, which were approximately $20,000 per year for the period 1946 through 1949

Appendix "C"

By the summer of 1948, the Popky offer was the only offer received by the taxpayer on the West River Street property and at that time he had a further discussion respecting the property with Goeringer. He was informed that the real estate market in Wilkes-Barre had suffered a substantial decline from the beginning of 1948, caused by the fact that building materials had become more plentiful, that there was a new suburban trend and a new trend toward the ranch-type house, which had resulted in reducing the fair market value of the taxpayer's West River Street property. The taxpayer was further advised by Goeringer that unless he was willing to wait for an indefinite period he would have to take a substantial loss in order to effect a reasonably prompt sale.

Thereupon the taxpayer decided to sell the house at the best price he could get, regardless of the property's fair market value. He was motivated in reaching this decision by the fact that the West River Street property in addition to his own residence was expensive to maintain and by the fact that the West River Street property was encumbered by a mortgage, which was undesirable to the taxpayer. When in the late summer of 1948 Dr. Guttman asked the taxpayer to renew his lease, he was informed that the house was for sale at the best possible price and that the taxpayer was asking $30,000 for the property without the furnishings. Dr. Guttman decided to, and did, purchase the house from the taxpayer at a price of $30,000. From his professional earnings he gave the taxpayer a check in the amount of $7,500 and he gave a check in the amount of $4,500 to the Miners National Bank, which had supplied the balance of the purchase price or $18,000, after taking a mortgage on the property in that amount. The taxpayer's debt to the Miners National Bank was paid in full and his mortgage was thereupon released. All negotiations concerning the sale of the West River Street property were conducted between the taxpayer, Dr. Guttman and the Miners National Bank. The taxpayer's

daughter, Claire Guttman, did not participate in any of these negotiations, nor was she a party to them. On Dr. Guttman's decision, title to the property was taken in the name of Dr. Guttman and Claire Guttman, his wife, as tenants by the entirety in accordance with the usual custom in Pennsylvania and in accordance with the custom of Dr. Guttman and his wife, who had taken title to all property acquired during their marriage, jointly. All of their bank accounts were held by Dr. Guttman, whose professional earnings supplied the funds, and his wife in their joint names, including his professional account. All of the moneys that went into these accounts were from Dr. Guttman's earnings.

At the time of her marriage to Dr. Guttman, Claire Guttman owned in her own name securities worth approximately $15,000, which were drawn upon while Dr. Guttman was pursuing his professional education and experience in his specialty to provide for the support of the family's living expenses. Of these securities, several thousand dollars worth were still owned by Claire Guttman at the time of the sale. After Dr. Guttman started his medical practice in 1945 his professional income was adequate and sufficient to support his family and himself in all respects. The taxpayer was never called upon and never did furnish any of the support of Guttman or his family, with the exception of an occasional gift of cash to his daughter upon occasions of her birthday, Christmas, etc.

Claire Guttman, as well as Dr. Guttman, signed the mortgage and accompanying bond in connection with the sale of the West River Street property and the simultaneous financing of the transaction by the Miners National Bank.

The case was originally tried by Judge Hill and was reviewed by the Tax Court in banc. Although the record is far from clear it appears that a majority of the judges of the court joined in a decision upholding the deficiency in the tax as asserted by the respondent as a result of

the disallowance of the alleged loss on the sale. Judge Opper, in an opinion concurred in by an undisclosed number of his colleagues, held the loss non-deductible under section 24(b)(1)(A) of the Code based upon his conclusion that the sale of the entire property must be regarded as having been made to the taxpayer's daughter. Judge Bruce, in an opinion joined in by Judges Murdock and Turner, concurred in the disallowance of the loss on the ground that the evidence did not establish that the taxpayer had actually suffered a loss. Judge Raum concurred in the result without opinion. Judge Hill, who saw and heard the witnesses, filed a dissenting opinion, joined in by Judges Arundell, Black, LeMire, Johnson and Tietjens, in which he concluded that the sale was in fact made to Dr. Guttman and not to his wife, that the taxpayer in fact suffered the loss which he claimed and that it was legally deductible by him for income tax purposes. Judge Van Fossan dissented without opinion 21 T.C.—.

The decision of the Tax Court must be reversed. Section 24(b) of the Internal Revenue Code in pertinent part provides:

> "(b) Losses from sales or exchanges of property
>
> "(1) Losses disallowed. In computing net income no deduction shall in any case be allowed in respect of losses from sale or exchanges of property, directly or indirectly—
>
> "(A) Between members of a family, as defined in paragraph (2)(D);
>
> * * * * *
>
> "(2) Stock ownership, family, and partnership rule. For the purposes of determining, in applying paragraph (1), the ownership of stock—
>
> . . .
>
> "(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; . . . "

Appendix "C"

Applying these statutory provisions to the case before us it will be seen that the loss, if any, which the taxpayer suffered upon the sale of the West River Street property was deductible by him for income tax purposes unless it was a sale between himself and his daughter, Claire Guttman. If it was a sale between himself and his son-in-law, Dr. Guttman, the loss was deductible, since a son-in-law is not within the class defined by section 24(b)(2)(D).[2] We are in complete accord with the views expressed by Judge Hill in his dissenting opinion that the sale in this case was between the taxpayer and Dr. Guttman and that no sale in fact took place to Claire Guttman who supplied no part of the consideration for the sale and received her interest in the property as a tenant by the entirety purely as a gift from her husband. Indeed the findings of fact of the Tax Court compel this conclusion for the court found: "Dr. Guttman decided to, and did, purchase the house from the petitioner at a price of $30,000. . . . The petitioner's daughter did not participate in any of these negotiations, nor was she a party to them."

The opinion filed by Judge Opper is based upon the proposition that under the law of Pennsylvania Claire Guttman became the owner of the entire property as a tenant by the entirety and accordingly was vendee of her father as to the whole property. The premise may be admitted but the conclusion sought to be drawn does not follow. For the fact that Mrs. Guttman acquired an estate by the entirety in the property under Pennsylvania law as a result of the direction of her husband that she be included as a grantee in the deed of conveyance did not make her, what in actual fact she was not, the purchaser of the property on a sale by her father, within the meaning of the Internal Revenue Code. As Judge Hill well said in his dissenting opinion, 21 T.C. —, "the majority relies

[2] Topek v. Commissioner of Internal Revenue, 1947, 9 T.C. 763, 766.

upon legal fiction in the effort to establish that a sale between the petitioner and his daughter was accomplished as a matter of law. The fiction relied upon belongs to the law of real property. It had its roots in the common law and was born centuries before income taxation was a gleam in the fiscal eye of government. This fiction argues that husband and wife are one. In the enactment and administration of revenue laws, fact rather than fiction is made to prevail." See Wisotzkey v. Commissioner of Internal Revenue, 3 Cir. 1944, 144 F.2d 632, 636 [32 AFTR 1240].

Moreover, the contention proves too much. For if Mrs. Guttman is to be regarded as grantee of the whole property under the Pennsylvania law of tenancy by the entirety and therefore as sole purchaser from the taxpayer, her husband, Dr. Guttman, must likewise under the same law be regarded as grantee of the whole and, therefore, likewise sole purchaser. It is obvious that at this point the fiction of the Pennsylvania law breaks down so far as concerns its usefulness to solve the tax question which is before us and that the question can only be solved upon a practical view of the actual facts of the case, disregarding the fictions of the ancient law of real property.

Holding, as we do, that any loss which the taxpayer sustained in the sale of the West River Street property to Dr. Guttman was deductible by the taxpayer in computing his taxable income for 1948, we are next met with the question whether he in fact sustained any loss in the transaction. This depends upon whether on September 1, 1947, when he first rented the property, its fair market value was more than $30,000, the amount for which he sold it to Dr. Guttman in late 1948. Witnesses for the taxpayer testified that the value on September 1, 1947 was $60,000. A witness for the respondent on the other hand testified after some equivocation that the value was only $30,000.

The Tax Court made no finding as to the 1947 value although it appears that a majority of the judges who expressed their views upon the question, including the

judge who took the testimony, found that the value was $60,000 as contended for by the taxpayer. This was the view taken by Judge Hill and the five judges who concurred with him. On the other hand only Judge Bruce and the two judges who concurred with him expressed the view that no loss had been suffered. Neither Judge Opper who wrote an opinion concurred in by an undisclosed number of other judges, Judge Raum who concurred in the result, or Judge Van Fossan who dissented, expressed any views on this question. Thus of the nine judges, a majority of the court in banc, who expressed their views six, a majority of that group, found the value to be $60,000. But the fact remains that six or, perhaps seven of their brethren in the court in banc did not deem it appropriate to consider the question. Under these circumstances we think it proper for the case to go back for a definitive determination of the September 1, 1947 value.

In sending the case back to the Tax Court we deem it proper to direct the court's attention to its failure to disclose in its report the names of all the judges who participated in the review of the case by the court in banc. The Internal Revenue Code provides that the full court may, when so directed by the chief judge, review a decision proposed by a division of the court[3] and that a majority of the sixteen judges of the court shall constitute a quorum for this purpose.[4] It is an accepted principle of judicial procedure that a judicial tribunal should disclose on its public record the members of the tribunal who have participated in camera in its decisions.[5] Only thus can the parties know whether a quorum of qualified judges has decided their controversy. The need of such disclosure is particularly well illustrated by this case. For it is well known that judges of the Tax Court are constantly re-

[3] Internal Revenue Code of 1954, § 7460(b).

[4] Internal Revenue Code of 1954, § 7444(d).

[5] State v. King, 1844, 27 N.C. 203; 21 C.J.S. Courts § 183 a.

quired to be absent from Washington to preside at hearings in other cities. Such judges may well not be able to participate in the review of a case by the full court while they are on circuit. And yet in this case at least fifteen of the sixteen judges must have participated since seven of them dissented from the decision which the court entered. The record discloses the names of twelve of these judges but neither we nor the parties know from the record how many others participated or who they were.

The practice of the Tax Court in this respect appears to follow that of an administrative agency rather than that of a judicial tribunal. But although Congress in the Internal Revenue Codes has continued to call the tribunal "an independent agency in the Executive Branch of the Government" it has at the same time more realistically designated it as a court and its members as judges.[6] And it is the fact that from its inception as the Board of Tax Appeals in 1924 it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government.[7] Its powers are wholly judicial in character.[8] It has never been given any administrative powers or functions nor has it ever

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[6] Act of October 21, 1942, § 504(a), 56 Stat. 957; Internal Revenue Code of 1954, § 7441.

[7] The jurisdiction which the Tax Court has exercised since 1942 under the Renegotiation Acts is likewise judicial in nature, involving controversies between government contractors and the Government as to whether profits received by such contractors are excessive when measured by the standards laid down in the Acts. Maguire Industries v. United States, 1949, 114 Ct. Cl. 687, 86 F. Supp. 905, cert. den. 340 U.S. 809.

[8] Blair v. Oesterlein Co., 1927, 275 U.S. 220, 227 [6 AFTR 7080]; Helvering v. Lazarus & Co., 1939, 308 U.S. 252, 255 [23 AFTR 778]; Uncasville Mfg. Co. v. Commissioner of Internal Revenue, 2 Cir. 1932, 55 F. 2d 893, 897 [10 AFTR 1208], cert. den. 286 U.S. 545, Commissioner of Internal Rev. v. Liberty Bank & Trust Co., 6 Cir. 1932, 59 F. 2d 320, 323 [11 AFTR 488]; Helvering v. Continental Oil Co., D.C. Cir. 1933, 68 F. 2d 750, 753 [13 AFTR 582], cert. den. 292 U.S. 627; Irwin v. Lawson, 5 Cir. 1938, 94 F. 2d 187, 190 [20 AFTR 674].

had any investigatory, regulatory or policy-making duties or powers. Since the passage of the Revenue Act of 1926 its decisions have been final and reviewable only on the record by the United States courts of appeals.[9] Since 1948 the scope of that review has been the same as in the case of like decisions of the district courts.[10] The Tax Court is thus for all practical purposes a judicial tribunal

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[9] In reporting to the House of Representatives the bill which became the Revenue Act of 1926 the Committee on Ways and Means said:

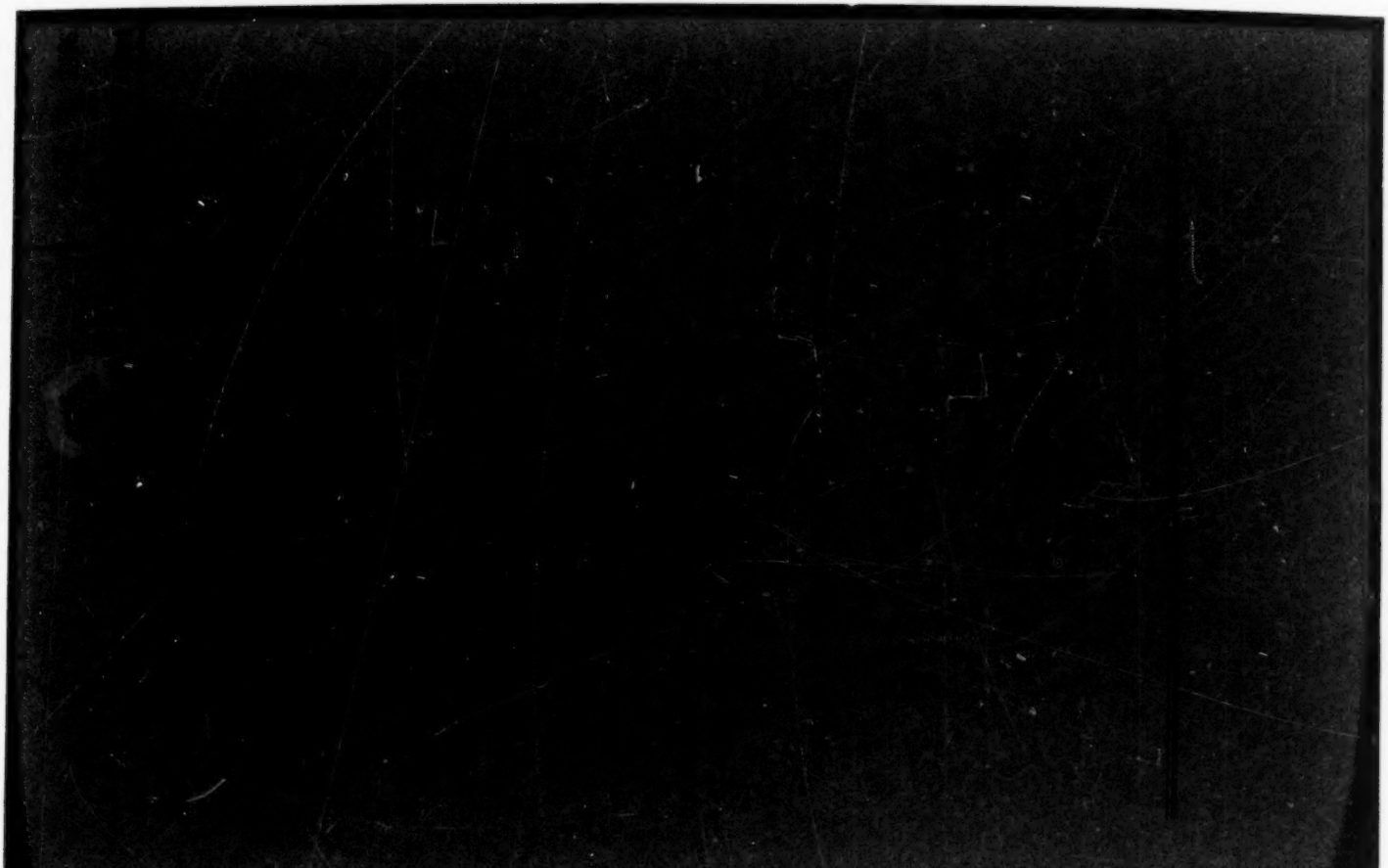
"In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty . . . " House Report No. 1 on H.R. 1, 69th Cong., 1st Sess., p. 20.

[10] This was accomplished by section 36 of the Act of June 25, 1948, 62 Stat. 991, which amended section 1141(a) of the Internal Revenue Code of 1939 so as to make the decisions of the Tax Court reviewable by the courts of appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." It is clear that by this action Congress intended (see Senate Report No. 1559 on H.R. 3214, 80th Cong., 2d Sess., pp. 2, 13) to repeal the rule laid down in Dobson v. Commissioner, 1943, 320 U.S. 489 [31 AFTR 773], which had severely limited the scope of review of Tax Court decisions upon the theory that the court was a specialized administrative body. Congress thus made plain that it regarded the Tax Court as a judicial tribunal rather than an administrative agency and intended that its decisions should be subject to the same review accorded judicial decisions.

This action by Congress following its previous action in 1942 in calling the agency a court and its members judges rendered obsolete Chief Justice Taft's early dictum in Old Colony Tr. Co. v. Comm'r Int. Rev., 1929, 279 U.S. 716, 725 [7 AFTR 8875], that "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decisions of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided."

operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an "independent" judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts. The court should accordingly follow accepted forms of judicial procedure by indicating in some appropriate way on its record in each case reviewed by the full court the names of the judges who participate in the decision ultimately rendered.

The decision of the Tax Court will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 371

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 62-92) rendered on the merits after the original hearing is reported at 22 T.C. 13. The memorandum opinion of the Tax Court after rehearing (R. 138-144) is not reported. The opinion of the Court of Appeals (Pet. App. 4a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1956. (R. 489.) The petition for a writ of certiorari was filed on August 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals was correct in dismissing the petitions for review on the ground that before the petitions were filed the Tax Court decisions had become final and the limitation period had expired within the meaning of Sections 1140 and 1142 of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Sections 272(b) and (h), 1100, 1113, 1117(a), (b) and (c), 1140(a) and 1142 of the Internal Revenue Code of 1939 and Section 7483 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 17-21.

STATEMENT

The Court of Appeals granted the Commissioner's motion to dismiss for lack of jurisdiction taxpayers' petitions for review on the ground that the petitions for review were not filed within three months after the decisions of the Tax Court were rendered as required by Section 1142 of the Internal Revenue Code of 1939 and Section 1140 providing when the Tax Court's decisions become final. (R. 460-476; Pet. App. B 5a, 10a.) The facts are not in dispute.

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in these consolidated cases (R. 62-92) after hearing had on December 10 and 11, 1951 (R. 2). The opinion concluded with the following words (R. 92): "The respondent's determination is sustained. Decisions will be entered for the respondent." On April 8, 1954, the Tax Court rendered its decision in each case, deciding in the case of taxpayer Bessie Lasky that there is a deficiency in income tax for 1943 in the amount of $224,722.55, and in the case

of taxpayer Jesse L. Lasky in the amount of $224,515.14. (R. 92-93.) A copy of each of these decisions was served by the Clerk of the Tax Court on April 9, 1954, by registered mail on Mr. Herschel B. Green, the first attorney of record for the taxpayers in the Tax Court proceeding. (R. 92-93, 105, 128.) No petition for review of these decisions in the Court of Appeals was filed within three months after April 8, 1954, the date the decisions were rendered.

Up to this point taxpayers had been represented in the Tax Court by Messrs. Herschel B. Green and Loyd Wright of Wright, Wright, Green and Wright, and Mr. Harrison Harkins. (R. 62.) However, on or about August 24, 1954, after expiration of the three months' period following the rendering of the decisions by the Tax Court, the present attorney for taxpayers filed with the Tax Court a motion for leave to file a motion to vacate its decisions out of time. (R. 93-94.) Such leave was granted, and on August 24, 1954, taxpayer moved to vacate the decisions of April 8, 1954. The following appears from the four affidavits (R. 95) filed in support of this motion:

Shortly after April 8, 1954, there were received at the offices of Wright, Wright, Green and Wright the findings of fact and opinion of the Tax Court in these cases, and on April 14, 1954, a conference was held at those offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Wright and Mr. Green (R. 95, 101), at which the findings of fact and opinion of the Tax Court were discussed, including such matters as the possibility of reversal on appeal and of compromise (R. 95-96, 99, 101-102, 103-104). Mr. Lasky was told in

the course of this conference that the Tax Court decisions in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky on the receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102-103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant was asked if the Decisions had been received, and Affiant informed him on each occasion that they had not. During one or two telephone conversations with Mr. Harkins, we made mention of the fact that the Decisions had not been received and that Affiant was keeping a constant lookout for the reecipt [sic] of these Decisions, having in mind the ninety-day appeal period above referred to.
>
> On or about July 26, 1954, Mr. Harkins informed Affiant that he had received word from the desk of the Tax Clerk that the Decisions had been entered in the two cases on April 8, 1954, and that copies thereof had been mailed to us. Affiant thereupon made an imediate search of the Lasky files in his office, and at that time and for the first time discovered copies of the two Decisions. They were on letter-size paper and had been permanently placed in one of the Lasky files on the correspondence side of the file rather than the legal side. Affiant thereupon, on that same day, telephoned Mr. Lasky and informed him that in going through his

> files Affiant had found the two Decision[s] and *they* they [sic] were dated April 8, 1954.

Mr. Harkins stated that under date of July 20, 1954 (R. 104), he wrote the Clerk of the Tax Court inquiring about the status of the proceedings and (R. 105)—

> That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California; * * *

Taxpayers' motion to vacate the decisions was heard on September 14 and 16, 1954. (R. 106-133.) At the hearing the following colloquy between court and counsel for taxpayers occurred (R. 126-128):

> The Court: * * * I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch [Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. * * *
>
> * * * * *
>
> Mr. Ash: The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize that

the decision would be simultaneous practically with the findings of fact and opinion except in some unusual situations like you mentioned. The only possible explanation is that, of course, Harkins did repeatedly ask Mr. Green if the decisions had come down and was assured that they had not.

As I understand it, for some reasons the Tax Court sent copies of the findings of fact and opinion to each of the counsel of record but, of course, following the established practice that we all know, the decisions went only to Mr. Green.

The Court: That still does not give me an answer to the question.

Mr. Ash: I do not know the answer.

* * * * *

Mr. Ash: I cannot understand it and I was astonished as could be when I first heard of this thing, which was just shortly before Mr. Heubusch of our office came down and looked through the file and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

The Court: The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though expressing regret that the situation had arisen, repeatedly made clear his objection to the granting of the taxpayers' motion to vacate on the ground that the Tax Court was without jurisdiction in the premises. (R. 112-113, 120-122, 129.)

At the hearing of September 14 and 16, 1954 (R. 106-133), no suggestion was made on taxpayers' behalf that a rehearing was desired for the purpose of offering additional evidence on the merits. Nevertheless, subsequently on or about October 11, 1954, taxpayers moved for leave to file an amendment to their motion to vacate the decisions, stating (R. 133) "The purpose of the motion to vacate the decisions is to obtain a rehearing of the case on its merits." Such leave was granted, and the pending motion to vacate the decisions was amended by the addition of the italicized words (R. 134):

> Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, *for the purpose of granting petitioners a rehearing of the case on its merits.* [Italics supplied.]

See also R. 469-472.

Thereafter, without any further proceedings, the Tax Court on December 13, 1954, granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

The Acting Chief Counsel, Internal Revenue Service, moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decision had become final and the court was without power to grant taxpayers' motion. (R. 136-137.) This motion was denied, as was also a motion for review by the entire Tax Court of the order vacating the decisions. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21 and 26, 1955), devoted exclusively to the merits. (R. 300-385.) Testimony of four witnesses was taken, including Mr. Lasky's accountant and his own additional testimony. (R. 139-140.) The Commissioner once more stated his objection to the new hearing on the ground that the Tax Court was without jurisdiction. (R. 383.)

By orders and decisions entered on June 30, 1955 (R. 138-141, 144-145), the Tax Court stated that it had concluded (R. 138-139)—

> that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. * * * In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954, received further and additional evidence at a hearing, and reconsidered the issue on the merits.
>
> The petitioner diligently and seasonably filed his motion for rehearing and reconsideration on the merits. This Court is continuously in session; it is not in session for a term or terms. The petitioner's motion was not filed, therefore, after a "term" of this Court had expired during which the original decision was entered.

However, the Tax Court further held on the basis of the original evidence and the additional evidence advanced at the further hearing, that it was not persuaded that it had erred in its original findings of fact and conclusions of law. It held, accordingly, that there were deficiencies in the identical amounts originally determined in the April 8, 1954, decisions.

From these decisions, entered June 30, 1955, taxpayers filed petitions for review in the court below. The Court of Appeals granted the Commissioner's motion to dismiss these petitions on the ground that the Tax Court was without jurisdiction to set aside its first decisions, and that the Court of Appeals had no jurisdiction to consider petitions to review the second decisions. (Pet. App. 10a.)

ARGUMENT

1. The court below was correct in holding that it had no jurisdiction to entertain the petitions for review. It is well settled by numerous cases decided by this Court and by the Courts of Appeals that, under Sections 1140 and 1142 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 19-20), the April 8, 1954, decisions of the Tax Court became "final" after the expiration of three months, or on July 8, 1954, without the qualifications which may exist in regard to ordinary judgments. Hence, the Tax Court was without power to make its order of December 13, 1954, vacating these decisions and granting taxpayers a further hearing on the merits (R. 135) or to render its decisions of June 30, 1955, after rehearing (R. 138-141, 144-145) from which the appeals dismissed by the court below were taken.

Congress has not only fixed a three month limitation after which a petition for review by a Court of Appeals may not be filed (Internal Revenue Code, Section 1142) [1] but, in addition, directed explicitly and in detail the specific times when decisions of the Tax Court "shall become final" (Section 1140 of the Code), as stated by this Court (*Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 726), "in respect to all the numerous instances which in the course of the review may naturally end further litigation." Thus, Tax Court decisions "become final * * * Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time." Section 1140(a).[2] Indeed, this Court has held itself deprived by the explicit requirements of Section 1140 (and its predecessor) of jurisdiction in cases, originating with the Tax Court to grant petitions for rehearing filed after expiration of the period provided by the Rules of the Court. *Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225. Hence, contrary to the view expressed by the Tax Court here (R. 139), it is immaterial, even if correct, that the sessions of the Tax Court are not limited by a "term."

While it is true that Congress has defined the "status" of the Tax Court "as an independent agency in the Executive Branch of the Government" (Internal Revenue Code, Section 1100, Appendix, *infra*, p. 18),[3] the result here in no way turns upon this definition or upon any "status" peculiar to the Tax Court, but upon

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[1] References to "Internal Revenue Code" or "Code" are, unless otherwise indicated, to the Internal Revenue Code of 1939.

[2] Congress has substantially continued the provisions of Section 1140 in the Internal Revenue Code of 1954, Section 7481.

[3] Congress has continued this definition of the "Status" of the Tax Court in the Internal Revenue Code of 1954, Section 7441.

a lack of power to reconsider, after decisions of the Tax Court have become final under Section 1140, which this Court has held binding upon itself in the cases above cited, and which the Courts of Appeals have also repeatedly decided is binding upon them as well as upon the Tax Court. *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C.A. 5); *Sweet* v. *Commissioner*, 120 F. 2d 77 (C.A. 1); *Crews* v. *Commissioner*, 120 F. 2d 749 (C.A. 10), certiorari denied, 314 U. S. 664; *Swall* v. *Commissioner*, 122 F. 2d 324 (C.A. 9), certiorari denied, 314 U. S. 697; *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C.A. 1); *McCarthy* v. *Commissioner*, 139 F. 2d 20 (C.A. 7); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C.A. 2); *White's Will* v. *Commissioner*, 142 F. 2d 746 (C.A. 3).[4]

The importance of the date, when the Tax Court decision becomes final, in the scheme of the statute setting up the Tax Court and providing for review of its decisions, is apparent from other references to it in the Code in connection with assessment of the tax.[5] In-

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[4] The rule has of course been applied against the Commissioner as well as against taxpayers. *Helvering* v. *Northern Coal Co.*, *supra*; *Commissioner* v. *Realty Operators*, *supra*; *Denholm & McKay Co.* v. *Commissioner*, *supra*.

[5] Thus, the Commissioner is required in case of a deficiency to serve a notice of deficiency upon the taxpayer and he is prohibited from making an assessment of the deficiency until the expiration of the ninety days, within which taxpayer may commence a proceeding in the Tax Court "nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court *has become final*." Section 272(a)(1), italics supplied. Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Tax Court "*has become final*." Section 272(b), italics supplied (Appendix, *infra*, p. 17). Again, Section 272(h) (Appendix, *infra*, pp. 17-18) specifically provides that "the date on which a decision of the Tax Court *becomes final* shall be determined according to the provisions of section 1140." (Italics supplied.)

deed, the Committee report, which recommended the adoption of the predecessor of Section 1140, as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, explained (S. Rep. No. 52, 69th Cong., 1st Sess., p. 37 (1939-1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

In this case the April 8, 1954, decisions of the Tax Court were duly served by registered mail upon counsel in accordance with the settled Tax Court practice.[6]

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[6] See Internal Revenue Code, Section 1113 (Appendix, *infra*, p. 18).

Rules of Practice before the Tax Court (Rev. Nov. 1952):

Rule 22.—Service

* * * * *

(b) *Upon first counsel of record.*—Service upon any counsel of record will be deemed service upon the party, but, where there are more than one, service will be made only upon counsel for petitioner whose appearance was first entered of record—unless the first counsel of record, by writing filed with the Court, designates other counsel to receive service, in which event service will be so made.

It is not claimed that the failure of taxpayers to realize that their time to petition for review was running was due to any fault of the Tax Court or the Commissioner; in similar circumstances the finality required by Section 1140 has repeatedly been enforced. *Commissioner* v. *Realty Operators, supra; Swall* v. *Commissioner, supra; McCarty* v. *Commissioner, supra; Monjar* v. *Commissioner, supra.*

2. Although the opinion below criticizes that of the Sixth Circuit in *Reo Motors* v. *Commissioner*, 219 F. 2d 610 (Pet. App. 8a-9a), the decision here is not in conflict with that of the Sixth Circuit (see Pet. 5-7). Here there are present no extraordinary circumstances which might warrant the exercise of jurisdiction to grant relief in the nature of a writ of error *coram nobis*. In the *Reo* case there was a mutual mistake of fact in entering into a stipulation, upon which the Tax Court decision had been based, and the court noted (p. 612) that—

> The petitioner points out that the Commissioner not only concedes this factual error, but is seeking to take advantage of it to the detriment of the petioner in resisting petitioner's claim under § 722.

Here, however, the Commissioner was not at all at fault and was in no sense a party to the error or inadvertence. Indeed, all that the Tax Court here asserted as the grounds for exercise of power to grant "extraordinary relief" (R. 138) was to "enable the petitioner to present new and additional evidence" and to enable the court to reconsider the issue on the merits to determine whether it had made any erroneous findings or legal conclusions. These grounds are not comparable to the

conceded errors, which went to the regularity of the proceeding itself and to which the Commissioner allegedly had himself contributed, that were involved in the *Reo Motors* case. The showing made to the Tax Court here was not such as would justify even granting a new trial on the basis of newly discovered evidence—had the motion been timely—for the evidence offered was merely cumulative and was not such as by due diligence could not have been adduced at the original hearing. (R. 139-144.) As this Court held in *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137, "Where it appears that a rehearing has been granted only for that purpose [to extend the time for appeal], the appeal must be dismissed."[7]

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[7] See also *Commissioner* v. *Realty Operators*, *supra*, p. 289. This principle plainly applies here. Taxpayers' original motion was simply to vacate the decisions entered on April 8, 1954. (R. 94.) At the full hearing, which was held on this motion on September 14 and 16, 1954 (R. 106-133), there was no suggestion that a further hearing on the merits was necessary to enable taxpayers to present new and additional evidence; substantially all that was discussed were the circumstances under which the time to file petitions for review had been permitted to lapse. Indeed, it was not until October 11, 1954, that the suggestion first was made that the Tax Court should vacate the April decisions for the purpose of granting taxpayers a rehearing on the merits. If taxpayers believed that the justice of their cause required the taking of additional evidence on the merits, which was the nominal reason for vacating the decisions and for the rehearing, it is not explained why they waited for approximately six months after receiving the Tax Court's findings and opinion before even suggesting to the Tax Court the need for a rehearing; nor is it explained why in the original motion to vacate, and in the course of the discussion at the hearing on that motion, no relief by way of adducing additional evidence on the merits was applied for. Concededly, taxpayers at all times were aware of the Tax Court's findings and opinion and there was no requirement that taxpayers await the Tax Court's decisions before moving for rehearing, if in fact the alleged extraordinary need existed for adducing additional evidence. Indeed, the Tax Court's rules provided (Rule 19(e) (Rev. Nov., 1952)) that "No motion for rehearing,

Contrary to taxpayers' contention (Pet. 7-8), the decision below does not conflict with that of the Fifth Circuit in *LaFloridienne J. Buttgenbach & Co.* v. *Commissioner*, 63 F. 2d 630. As the opinion below points out, the *Buttgenbach* case is readily distinguishable on its facts. (Pet. App. 9a.) The order of the Board of Tax Appeals there vacated was based on a stipulation and the Board itself had never ascertained what if any taxes were owed. Both parties agreed to set aside the stipulation, and the Fifth Circuit ruled only that a redetermination based on a stipulation could be vacated at the instance of the parties to the stipulation. It may be added that the *Buttgenbach* case has been questioned or distinguished by the First Circuit in the *Sweet* case, *supra*, p. 81, the Second Circuit in the *Monjar* case, *supra*, p. 265, and the Third Circuit in the case of *White's Will*, *supra*, pp. 748, 749. Moreover in the *Swall* case, p. 325, the Ninth Circuit considered that the *Buttgenbach* case was in effect overruled by *Helvering* v. *Northern Coal Co.*, 293 U. S. 191.

Finally, the decision of the Third Circuit in *Stern* v. *Commissioner*, 215 F. 2d 701, is not, as taxpayers contend (Pet. 8-10), in conflict with the decision below "on the question of whether the Tax Court is a judicial tribunal." The holding there was merely that the Tax Court should follow accepted forms of judicial procedure by indicating in some appropriate way on its

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further hearing, or reconsideration may, except by special leave, be filed more than 30 days after the *opinion* has been served * * *." (Italics supplied.) Moreover, the record shows that at the conference of April 14, 1954, attended by taxpayer Jesse Lasky and his attorneys, there was no suggestion of a need, extraordinary or otherwise, to adduce additional evidence. (R. 96, 99, 101-102, 103-104.)

record in each case reviewed by the full court the names of the judges who participated in the decision. But, as already pointed out, pp. 10-12, *supra*, there is no question here as to whether the Tax Court is or is not a judicial tribunal. This case calls for no inquiry into such broad questions as whether the Tax Court is "a judicial tribunal," or whether it exercises "inherently judicial functions".

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(b) [8] *Collection of Deficiency Found by the Tax Court.* [9]—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h) [10] *Final Decisions of the Tax Court.*—For

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[8] Internal Revenue Code of 1954, Section 6215(a) (26 U.S.C., 1952 ed., Supp. II, Sec. 6215), is substantially identical.

[9] Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

* * * * *

(c) *References.*—All references in any statute (except this section), or in any rule, regulation, or order, to the "Board of Tax Appeals" or to the "Board" when used in the sense of "Board of Tax Appeals", or to the "member", "members", or "chairman" thereof shall be considered to be made to The Tax Court of the United States, the judge, judges, and presiding judge thereof, respectively.

[10] Internal Revenue Code of 1954, Section 6214(c) reads as follows:

Final Decisions of Tax Court.—For purposes of this chapter and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

(26 U.S.C., 1952 ed., Supp. II, Sec. 6214(c).)

the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

* * * * *

26 U.S.C., 1952 ed., Sec. 272.)

SEC. 1100[11] [As amended by Sec. 504(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States.

(26 U.S.C., 1952 ed., Sec. 100.)

* * * * *

SEC. 1113.[12] SERVICE OF PROCESS.

The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Tax Court shall be held sufficient service of such pleading, decision, order, notice, or process.

(26 U.S.C., 1952 ed., Sec. 1113.)

SEC. 1117.[13] REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable.

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[11] Internal Revenue Code of 1954, Section 7441 (26 U.S.C., 1952 ed., Supp. II, Sec. 7441), is substantially identical.

[12] Internal Revenue Code of 1954, Section 7455 (26 U.S.C., 1952 ed., Supp. II, Sec. 7455), is substantially identical.

[13] Internal Revenue Code of 1954, Section 7459(a), (b) and (c) (26 U.S.C., 1952 ed., Supp. II, Sec. 7459), is substantially identical.

The decision shall be made by a member in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

(c) *Date of Decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * *

(26 U.S.C., 1952 ed., Sec. 1117.)

SEC. 1140. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) [14] *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

* * * * *

(26 U.S.C., 1952 ed., Sec. 1140.)

* * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

(26 U.S.C., 1952 ed., Sec. 1142.)

Internal Revenue Code of 1954:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the

[14] Internal Revenue Code of 1954, Section 7481(1) (26 U.S.C., 1952 ed., Supp. II, Sec. 7481), is substantially identical.

taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

(26 U.S.C., 1952 ed., Supp. II, Sec. 7483.)

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